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7  
8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF NEVADA

10 In re:	)	Case no: BK-N-11-53706
	)	Chapter 11
11 DHILLON GROUP LLC, dba	)	
12 HOLIDAY INN EXPRESS,	)	US TRUSTEE'S OBJECTION TO
	)	APPLICATION TO EMPLOY ATTORNEY
13 Debtor	)	Hearing Date: January 3, 2012
		Hearing Time: 2:00 p.m.
		Est. Time Req.: 30 mins.

14 The Acting United States Trustee ("US Trustee"), respectfully submits his objection to the  
15 Application To Employ Attorney For Debtor: Kung & Brown (the "Application").

16 The Application cannot be approved because the Applicant concurrently represents Dhillon  
17 Group, LLC, in case no. 09-54640-GWZ, which is owed \$24,200 by this Debtor. Such dual  
18 representation violates 11 U.S.C. § 327, the prohibition against representing conflicting interests  
19 Nevada Rule of Professional Conduct ("NRPC") 1.7, and the requirement of a professional's  
20 fiduciary duty of undivided loyalty to his client.

21 This Objection is made pursuant to Section 327 of the Bankruptcy Code, Federal Rules of  
22 Bankruptcy Procedure ("FRBP") 2014, and NRPC 1.7. This Objection is also based upon the  
23 following points and authorities, the pleadings and papers on file herein and in Case No. 09-54640-  
24 GWZ, for which the US Trustee requests judicial notice be taken.

25 **POINTS AND AUTHORITIES**

26 The US Trustee, pursuant to the provisions of 28 U.S.C. § 586(a)(3)(I), has the duty to  
27 monitor applications filed under Section 327 of title 11 and, when deemed appropriate, to file  
28 with the Court comments and objections with respect to the approval of such applications.

1 Section 327(a) authorizes the debtor to employ professionals who are: (i) disinterested  
2 persons, and (ii) that do not hold or represent an interest materially adverse to the estate, any  
3 class of creditors, or equity security holders. In order to enforce compliance with these  
4 prohibitions, FRBP 2014 requires employment applications and the accompanying verified  
5 statement to state “to the best of the applicant’s knowledge, all of the person’s connections with  
6 the debtor, creditors, any other party in interest, their respective attorneys and accountants, the  
7 United States trustee or any person employed in the office of the United States trustee.” FRBP  
8 2014(a).

9 “Section 327(a) prescribes a two-pronged test for the employment of a professional  
10 person—the ‘adverse interest’ test and the ‘disinterestedness’ test, both of which must be met  
11 before a professional person is eligible to be employed.” In re Kings River Resorts, Inc. 342  
12 B.R. 76, 88 (Bankr. E.D. Cal. 2006). If the professional sought to be employed does not satisfy  
13 one prong of this standard, the Bankruptcy Code prohibits the Court from authorizing his or her  
14 employment. In re Middleton Arms, Ltd. Partnership, 934 F.2d 723 (6<sup>th</sup> Cir. 1991). The Court  
15 may not approve the employment of a person who is not disinterested, even if such employment  
16 would be in the best interests of the debtor. Id. “The bankruptcy court does not have authority to  
17 allow the employment of a professional in violation of § 327, and the employment is void *ab*  
18 *initio*.” In re Mehdipour, 202 B.R. 474, 478 (9<sup>th</sup> Cir. BAP 1996), affirmed without opinion, 139  
19 F.3d 1303 (9<sup>th</sup> Cir. 1998), citing, In re EWC, Inc., 138 B.R. 276, 281 (Bankr. W.D. Okla. 1992).

20 A “disinterested person” is defined in 11 U.S.C. § 101(14):

21 The term “disinterested person” means a person that—

- 22 (A) is not a creditor, an equity security holder, or an insider;  
23 (B) is not and was not, within 2 years before the date of the filing of the petition, a  
24 director, officer, or employee of the debtor; and  
25 (C) does not have an interest materially adverse to the interest of the estate or of  
any class of creditors or equity security holders, by reason of any direct or indirect  
relationship to, connection with, or interest in, the debtor, or for any other reason.

26 “Disinterestedness has been defined as possessing or asserting any economic interest that  
27 would tend to lessen the value of a bankruptcy estate or create an actual or potential dispute in  
28 which the estate is a rival claimant.” In re Kings River Resorts, Inc. 342 B.R. at 87. The purpose  
of the rule is to assure undivided loyalty to the debtor. Id. citing, First Interstate Bank of Nevada,

1 N.A. v. CIC investment Corporation (In re CIC investment Corp.), 192 B.R. 549, 553-554  
2 (9thCir. BAP 1996). “[T]he bankruptcy court must determine whether any competing interest of  
3 a court-appointed professional ‘created either a meaningful incentive to act contrary to the best  
4 interests of the estate and its sundry creditors—an incentive sufficient to place those parties at  
5 *more than acceptable risk—or the reasonable perception of one.*’” In re Kings River Resorts, Inc.  
6 342 B.R. at 84, citing, Rove v. Braunstein, 19 F.3d 54, 58 (1<sup>st</sup> Cir. 1994) citing, In re Martin, 817  
7 F.2d 175, 180 (1<sup>st</sup> Cir. 1987)(Emphasis in original).

8 The term “adverse interest” is not defined by the Code. However, by judicial definition,  
9 “to *hold* an adverse interest” [means:] (1) to possess or assert any economic interest that would  
10 tend to lessen the value of the bankruptcy estate or that would create either an actual or potential  
11 dispute in which the estate is a rival claimant; or (2) to possess a predisposition under  
12 circumstances that render such bias against the estate.” In re Tevis, 347 B.R. 679, 688 (9<sup>th</sup> Cir.  
13 BAP 2006). See also, In re American Printers, 148 B.R. 862 (Bankr. N.D. Ill. 1992); Collier on  
14 Bankruptcy § 327.04[2][b], pg. 327-41 (L. King 15<sup>th</sup> ed. Rev. 2006). “The ultimate decision as  
15 to whether there is a disqualifying conflict or adverse interest lies within the discretion of the  
16 court.” In re Mehdipour, 202 B.R. at 478.

17 To *represent* an adverse interest means to serve as an attorney for an entity  
18 holding such an adverse interest. In re Star Broadcasting, 81 B.R. 835, 838  
(Bankr. D.N.J. 1988); In re Roberts, 46 B.R. 815, 827 ((Bankr. D. Utah 1985),  
19 aff’d in relevant part, 75 B.R. 402 (D. Utah 1987). For the purposes of  
20 disinterestedness, a lawyer has an interest materially adverse to the interest of the  
21 estate if the lawyer either holds or represents such an interest. See, e.g., Electro-  
Wire Prods., Inc. V. Sirote & Permutt (In re Prince), 40 F.3d 356, 360-61 (11<sup>th</sup>  
22 Cir. 1994); Star Broadcasting, 81 B.R. at 838; Roberts, 46 B.R. at 827.

23 In re Tevis, 347 B.R. at 688.

24 NRPC 1.7<sup>1</sup> states: “a lawyer shall not represent a client if the representation involves a  
25 concurrent conflict of interest.” “A concurrent conflict of interest exists if: (1) The  
26 representation of one client will be directly adverse to another client; or (2) There is a significant  
27 risk that the representation of one or more clients will be materially limited by the lawyer’s

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28 <sup>1</sup> The applicability of NRPC 1.7 is addressed in In re Rossana, 395 B.R. 697, 701 n.4 (Bankr.  
D. Nev. 2008).

1 responsibilities to another client, a former client or a third person or by a personal interest of the  
2 lawyer.” NRPC 1.7.

3 Subsection (b) of NRPC 1.7 regarding waiver is not applicable because Section 327 does  
4 not allow its limitations on employment to be excused by waiver or circumvented by agreement  
5 or consent. In re Amdura, 121 B.R. 862, 866 (Bankr. D. Colo. 1990).

6 APPLICATION OF LEGAL AUTHORITIES TO FACTS

7 A professional should not put himself in the position of having to divide his loyalties.  
8 Representing more than one adverse party, such as a debtor and its creditors, presents an inherent  
9 conflict of interest because both clients rely upon the professional’s advice and the client’s  
10 respective interests are adverse to each other. A professional in a bankruptcy case should not put  
11 himself in a position where such influences and issues may arise.

12 Applicant currently represents Dhillon Properties, LLC, case no. 09-54640-GWZ, which  
13 is owed \$24,200 by the Debtor. November 30, 2011, Balance Sheet, Docket #216, pg. 12. A  
14 true and correct copy is attached hereto for the convenience of the Court. Dhillon Properties  
15 LLC, is also a “debtor-in-possession.” The debt between Dhillon Properties, LLC and the Debtor  
16 is a current conflict and adverse interests exist between the Debtor, Dhillon Properties LLC, Elko  
17 Gold Mine, LLC and Dhillon Management Company, LLC.

18 For example, in Dhillon Properties LLC, the debt of Dhillon Group, LLC is not scheduled  
19 as an account receivable. Docket #1, pg. 10. Applicant also did not disclose the account  
20 receivable from Dhillon Group, LLC in its description of assets in its disclosure statement.  
21 Dhillon Properties, LLC, Docket #160, pg. 9. The first disclosure statement for Dhillon  
22 Properties LLC has a secured debt owed to Elko Gold Mine, LLC, but not the amended  
23 disclosure statement.

24 Applicant has not disclosed in its FRBP 2014 declaration its connections with Dhillon  
25 Properties, LLC, Elko Gold Mine, LLC, and Dhillon Management Company, LLC, nor has it  
26 disclosed the debt between Dhillon Properties, LLC and the Debtor.

27 Applicant is required as general bankruptcy counsel to negotiate the terms of a repayment  
28 plan for each estate. Applicant cannot negotiate with itself.

1 Section 328( c) of the Bankruptcy Code states that:

2 The Court may deny allowance of compensation for services and reimbursement  
3 of expenses of a professional person employed under section 327 or 1103 of this  
4 title if, at any time during such professional person's employment under section  
5 327 or 1103 of this title, such professional person is not a disinterested person, or  
6 represents or holds an interest adverse to the interest of the estate with respect to  
7 the matter on which such professional person is employed. (Emphasis added).

8 Applicant is, and has been since it accepted employment by both Debtors, not  
9 disinterested and representing materially adverse interests. Concurrent representation of adverse  
10 interests results in automatic disqualification under 11 U.S.C. § 327(a). In re Tevis, 347 B.R. at  
11 691.

12 Any professional who the court determines to hold or represent an interest adverse  
13 to the estate or who is not disinterested is not an officer of the estate during the  
14 time of conflict and must be denied compensation for services performed during  
15 the conflict pursuant to § 330. EWC, 138 B.R. at 281. However, the bankruptcy  
16 court has discretion to award or deny compensation for services performed outside  
17 of a conflict. Id. at 282.

18 In re Mehdipour, 202 B.R. at 478. See also, In re Kings River Resorts, Inc., 342 B.R. 76, 87-  
19 89 (Bankr. E.D. Cal. 2006); In re Tevis, 347 B.R. 679 (9<sup>th</sup> Cir. BAP 2006).

20 Despite full knowledge of the conflicts and the requirements of Section 327 and FRBP  
21 2014, Applicant accepted employment by the conflicting clients and has continued to represent  
22 them both post petition. Such open and willful disregard for the requirements of the Bankruptcy  
23 Code should not be tolerated by the Court.

### 24 CONCLUSION

25 WHEREFORE, for all the reasons stated above, the US Trustee respectfully requests the  
26 Court deny the Application To Employ Counsel and grant other relief as the Court deems proper.

27 DATED this 27th day of December, 2011.

28 Respectfully submitted,

Nicholas Strozza, State Bar # CA 117234  
William B. Cossitt., State Bar #3484  
300 Booth Street, #3009  
Reno NV 89509  
(775) 784-5335

/s/ **WILLIAM B. COSSITT**

Attorneys for Acting United States Trustee  
August B. Landis

**CERTIFICATE OF SERVICE**

1. On December 27, 2011 I served the foregoing US TRUSTEE'S OBJECTION TO APPLICATION TO EMPLOY ATTORNEY FOR DEBTORS.
2. I served the above-named document(s) by the following means to the persons as listed below:
  - ☐ **a. ECF System** (attach Notice of Electronic Filing or list of persons & addresses):  
  
A.J. KUNG ajkung@ajkunglaw.com,  
bbrown@ajkunglaw.com;paralegal7@ajkunglaw.com;paralegal4@ajkunglaw.com;paralegal5@ajkunglaw.com;paralegal3@ajkunglaw.com;fileclerk@ajkunglaw.com;paralegal1@ajkunglaw.com  
  
GEORGE C LAZAR glazar@foxjohns.com, gclazar@sbcglobal.net  
  
U.S. TRUSTEE - RN - 11 USTPRegion17.RE.ECF@usdoj.gov
  - ☐ **b. U.S. Mail, postage fully prepaid** (list persons and addresses):

**I declare under penalty of perjury that the foregoing is true and correct.**

Signed: December 27, 2011

/s/ Kristine Kinne  
KRISTINE KINNE

Exhibit “A”

**Dhillion Properties LLC dba Holiday Inn Express****Balance Sheet**

As of November 30, 2011

12/20/11

	Nov 30, 11
<b>ASSETS</b>	
Current Assets	
Checking/Savings	
100 · Cash	
101 · Cash on Hand	2,663.22
107 · DIP Account -Main - 8009	425,144.37
108 · DIP Account -Oper - 2817	1,055.89
Total 100 · Cash	428,863.48
Total Checking/Savings	428,863.48
Accounts Receivable	
120 · Accounts Receivable	
121 · Guest Ledger	328,909.39
Total 120 · Accounts Receivable	328,909.39
130 · Other Receivables	
133 · Other Receivables	
DMC	56,635.41
Fort worth	58,500.00
Lake Charles	855.46
Sherman	24,200.00
Sweetwater	9,606.66
Total 133 · Other Receivables	149,797.53
Total 130 · Other Receivables	149,797.53
Total Accounts Receivable	478,706.92
Total Current Assets	907,570.40
Other Assets	
170 · Property and Equipment	
171 · Land	1,001,343.00
172 · Building	4,000,000.00
173 · Machinery & Equipment	12,217.94
174 · Leasehold Improvements	135,512.00
175 · Furniture & Fixtures	434,248.43
179 · Accumulated Depreciation	-1,100,392.00
Total 170 · Property and Equipment	4,482,929.37
190 · Other Assets	
192 · Loan origination cost	178,000.00
194 · Pre-Opening Cost	111,917.00
195 · Franchise Cost	50,000.00
196 · Accumulated Amortization	-100,571.00
Total 190 · Other Assets	239,346.00
Total Other Assets	4,722,275.37
<b>TOTAL ASSETS</b>	<b>5,629,845.77</b>
<b>LIABILITIES &amp; EQUITY</b>	
Liabilities	
Current Liabilities	
Accounts Payable	
200 · Accounts Payable	41,588.95
Total Accounts Payable	41,588.95
Other Current Liabilities	
210 · Loan Payable	
211 · Owners CC	90.00
213 · Diners Club 2672	7,840.43
Total 210 · Loan Payable	7,930.43
215 · Other Payables	



**Dhillon Properties LLC dba Holiday Inn Express**  
**Balance Sheet**  
As of November 30, 2011

12/20/11

	<u>Nov 30, 11</u>
Other Payables- Duncan	1,166.67
Other Payables- Waxahachie	1,416.66
Total 215 - Other Payables	2,583.33
240 - Other Taxes	
242 - Taxes- Sales Tax	344.26
244 - Taxes- Property Tax	15,697.97
248 - Taxes- City Occupancy Tax	151,294.00
Total 240 - Other Taxes	167,336.23
260 - Accruals	
262 - Accrued Payroll	2,074.70
263 - Accrued Franchise Fees	19,978.82
Total 260 - Accruals	22,053.52
Total Other Current Liabilities	199,903.51
Total Current Liabilities	241,492.46
Long Term Liabilities	
281 - Notes Payable	8,679,561.40
Total Long Term Liabilities	8,679,561.40
Total Liabilities	8,921,053.86
Equity	
293 - Contribution	
Advance Draw for Bawa	-346,439.32
293 - Contribution - Other	34,942.83
Total 293 - Contribution	-311,496.49
294 - Distribution	-3,704,307.03
297 - Members Equity	455,957.42
Net Income	268,638.01
Total Equity	-3,291,208.09
<b>TOTAL LIABILITIES &amp; EQUITY</b>	<b>5,629,845.77</b>